Centre for Women's Justice

Making self-defence accessible to victims of domestic abuse who use force against their abuser:

Learning from reforms in Canada, New Zealand and Australia

About the Centre for Women's Justice

Centre for Women's Justice (CWJ) is a lawyer-led charity. We carry out strategic litigation and work with frontline women's sector organisations to challenge police and prosecution failings around violence against women and girls (VAWG). Our evidence base is built on the experience of frontline women's sector support workers discussed during our training sessions with them, the requests for legal advice they send to us, and our research. In 2021 we responded to 1,081 legal enquiries, including 559 in which we gave legal advice.

About this briefing

This briefing contains summaries of papers by academic experts in Canada, New Zealand and Australia about attempts made in those jurisdictions to make self-defence more accessible to victims of domestic abuse who use force against their abuser, and the impact of reforms. The full version of each paper is available on the CWJ website. We also provide contextual information about research in England and Wales on the effectiveness of existing defences, and proposed reforms.

Our purpose is to inform government and parliamentarians in England and Wales about the reforms undertaken in this area in comparable jurisdictions, and to stimulate action to improve law and practice here by making self-defence accessible for victims of domestic abuse who defend themselves against their abuser.

Credits and acknowledgments

Sections One to Three of this briefing summarise papers by:

- Professor Elizabeth Sheehy, Professor Emerita of Law, University of Ottawa, Canada
- Professor Julia Tolmie, University of Auckland, New Zealand
- Professor Arlie Loughnan, University of Sydney Law School and Dr Clare Davidson, University of Sydney Law School and Research Associate, Australian Catholic University. We would like to thank Stella Tarrant for her valuable contributions to the coverage of Western Australian law and practice, and Heather Douglas, Danielle Tyson and Bronwyn Naylor for comments.

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Executive Summary

The inaccessibility of self-defence for victims of domestic abuse who use force against their abuser is widely acknowledged in many jurisdictions. Attempts have been made in Canada, Australia and New Zealand to address this through reforms in law and practice, with some evidence of success. Analysis from experts in these jurisdictions illustrates that this is a complex problem requiring a multifaceted approach, including attention to law, procedure, education and culture. Lessons may be drawn from the progress made in these comparable jurisdictions, to inform debate and encourage reforms in England and Wales.

Introduction – the context in England and Wales

Links between domestic abuse and women's criminalisation

At least 57% of women in prison and under community supervision by probation services in England and Wales are victims of domestic abuse, and for many this is directly linked to their offending.[1] The true figure is likely to be much higher because of barriers to women disclosing abuse.[2]

CWJ's Double Standard report (2022) sets out how women's offending is often directly linked to their own experience of domestic abuse, and how victims can be unfairly criminalised.[3] This is also reflected in cases referred to CWJ's legal advice team, and in the work of Justice for Women and Harriet Wistrich over many years. It was further underlined by CWJ's No Safe Space report findings (2022), based on discussions with women with lived experience and frontline practitioners in the West Midlands.[4] CWJ's 'Women who kill' report (2021) illustrates how failings in law and practice lead to injustice for women who kill abusive men.[5] All these reports make recommendations for reforms in law and practice. Research published this year further illustrates the injustices faced by victims who are

coerced into offending by their abuser.[6] Intersectional discrimination and inequalities experienced by Black, Asian, minoritised and migrant women can increase the risk of unjust criminalisation.[7]

England and Wales – key facts

- As well as being victims of VAWG and exploitation, the majority of women in contact with the criminal justice system are experiencing multiple disadvantage including mental health needs, harmful substance use and poverty.[8]
- Research in 2012 found that women are three times more likely to be arrested than their male partners at a domestic abuse incident involving counter-allegations, often where they have used force to protect themselves from further harm from their abuser.[9]
- 63% of girls and young women (16–24) serving sentences in the community have experienced rape or domestic abuse in an intimate partner relationship.[10]
- Of 173 women screened at HMP Drake Hall, 64% reported a history indicative of brain injury and for most this was caused by domestic violence.[11]
- Around half of arrests of women for alleged violence result in no further action[12], highlighting the need for the police to respond to incidents of alleged violence in a gender-informed way.
- Women are more likely than men to commit an offence to support someone else's drug use (48% to 22%).[13]
- Some women are coerced into offending by abusive partners or face malicious allegations, as abusers use the criminal justice system as a way of extending control over their victim.[14]

Policy context

Controlling or coercive behaviour in an intimate or family relationship became a criminal offence under the Serious Crime Act 2015 and domestic abuse is defined in law under the Domestic Abuse Act 2021. The UK government recognises the links between domestic abuse and women's offending but has opposed the introduction of statutory defences for victims.[15] There are concerns that recent and forthcoming legislation may increase the risk of criminalisation for victims of VAWG, particularly young women, and Black, minoritised and migrant women.[16]

The government's opposition to implementing a firewall to end the sharing of victims' and witnesses' data between the police and the Home Office for immigration enforcement purposes, as has been widely recommended[17], prevents migrant victims coming forward to report abuse and seek help, increasing their risk of abuse and consequent criminalisation.

Revelations over the last two years have illustrated a cultural problem within the police and criminal justice system and its treatment of women and girls as victims and offenders, with evidence of systemic racism and sexism in the police, police-perpetrated VAWG, and plummeting prosecutions and convictions for rape and domestic abuse offences.[18] In March

2021 the then Home Secretary requested a review of the police treatment of women and girls as suspected offenders which has not yet begun.

The government-commissioned Domestic Homicide Sentencing Review by Clare Wade KC has proposed reforms which take account of cases in which women kill their abusers, highlighting the gendered nature of the law in this area, and recommending that a consultation should be carried out to examine the effectiveness of defences.[19] Wade raised concerns that the initial government response to her review suggested only some of her recommendations would be implemented, but it is hoped that in its full response the government will consider the recommendations in the round.[20]

Self-defence in England and Wales

The law on self-defence in England and Wales allows the use of reasonable force and requires the degree of force to be proportionate. The law has long been criticised for being less accessible for women who use force than it is for men.[21] In particular women using force against abusive male partners have had difficulties satisfying the traditional requirements of the defence that force was used in response to an **imminent threat** and that the force used was **proportionate** to that threat. At the same time low levels of awareness about the dynamics and impact of domestic abuse (and misogyny as identified in recent reports) have affected decision making in the criminal justice system to women's detriment.[22]

Where women use force against their abuser, their actions are likely to be found to be disproportionate because they are likely to use a weapon (against their usually physically larger and violent abuser) and courts tend to focus on the immediate circumstances of the incident, without considering the history of abuse.[23]

In 2021, CWJ published the findings of a four-year study of the criminal justice response to women who kill abusive men.[24] One key finding was that women who kill abusive men are rarely acquitted on the grounds of self-defence. Of the 92 cases included in the study, 43% (n=40) were convicted of murder, 46% were convicted of manslaughter (n=42) and just 7% of women were acquitted (n=6).[25] Fourteen women had tried to run self-defence as part of their defence, however they were not successful and were convicted of either manslaughter or murder.[26]

CWJ's research found multiple examples of cases where the Crown Prosecution Service (CPS) pursued a murder conviction despite clear evidence of a context of domestic abuse indicating that either non-prosecution (where there is evidence that she was acting in self-defence) or prosecution for manslaughter would be more appropriate. This has led to women being convicted and serving long sentences that do not appear to be in the public interest, particularly where they were the primary carers of children.[27] Where self defence fails, women are often convicted of murder, as they may not have advanced alternative partial defences, even where there is a clear history of domestic abuse.

The limited effectiveness of self-defence in these cases arises from gaps in law and practice, including the following:[28]

- Difficulties establishing proportionality where a weapon has been used.
- Proceedings overly focused on the events immediately surrounding the killing, rather than the history of abuse.
- Non-disclosure or late disclosure of abuse by the victim defendant, hindered by the challenge of building a trusting relationship with her defence lawyer, including the

time and commitment needed from the lawyer to achieve this amid shrinking legal aid provision.

- Challenges faced by lawyers in presenting evidence of abuse including lawyers' lack of expertise, time, resources and commitment.

- Lack of safeguards for victim defendants giving evidence in court about their experience of abuse.

- Myths and stereotypes relied on by prosecutors, judges and juries particularly around women who have committed an act of violence, leading to character assassination and misinterpretation of behaviour by victim defendants.

- Courts' reluctance to admit expert evidence about the nature and dynamics of domestic abuse other than from psychiatrists who necessarily focus on women's mental health. The dynamics of domestic abuse and coercive and controlling behaviour are rarely well understood by members of the public, as well as the cultural context for Black, minoritised and migrant victim defendants. Despite this, judges commonly suggest these are matters of common sense.

We found that in most cases where women kill abusive men they use a weapon, in contrast to a significant proportion of cases where men kill partners with their bare hands. This is almost certainly due to their smaller physical size as well as their knowledge of the violence of which their abuser is capable.[29]

The fear of a domestic abuser, experienced largely by women, '*is not always understood, considered reasonable or within common sense knowledge, and is often contested as insufficient to excuse violent defensive conduct'.*[30] In 2004, the Law Commission explained how the law of self-defence had been criticised for failing to assist '[t]*he abused child, or adult, who fears further physical abuse at the hands of a serial abuser, who perceives no prospect of escape and who is well aware that there is such a physical mismatch that to respond directly and proportionately to an attack or an imminent attack will be futile and dangerous. Such a person, who uses disproportionate force…is unassisted by the law of self-defence*…'[31]

Lawyers see self-defence as a 'risky' defence in cases involving women who have killed their abuser, and women often submit a guilty plea to a lesser charge of manslaughter if given the opportunity, even where self-defence has merit, in order to avoid the high stakes of going to trial, the trauma of cross-examination, being potentially convicted of murder, and receiving a longer sentence if they fail.[32]

Proposed statutory reforms

In 2017, in light of the strong links between domestic abuse and women's alleged offending, and evidence of the ineffectiveness of self-defence and duress as defences for victims who are accused of offending, the Prison Reform Trust (PRT) recommended the introduction of statutory defences for women whose offences arose from coercion within an abusive relationship, and where women used force against a primary aggressor.

Working in collaboration with the Criminal Bar Association, CWJ and others, PRT developed the following amendments which CWJ later put forward to be tabled in the Domestic Abuse Bill (they are amendments 37, 38 and 83 in this marshalled list):[33]

a) A new clause amending the law on self-defence, modelled on provisions introduced for householders in Section 76 of the Criminal Justice and Immigration Act 2008.

This would allow survivors acting in self-defence against their abuser the same protection as householders defending themselves against an intruder.

b) A new clause and schedule introducing a statutory defence for survivors, modelled on Section 45 of the Modern Slavery Act 2015. This would give survivors of domestic abuse similar protection to victims of trafficking who are compelled to offend.

The proposals were passed in the House of Lords but were opposed by the government and subsequently fell in the Commons. Lord Wolfson, on behalf of the government, explained:[34]

> *Although the Government are wholly sympathetic to the plight of victims of domestic abuse, we are unpersuaded that there is a gap in the law here that needs to be filled.*

The government's opposition to the proposals has since been criticised.[35] The proposals are being put forward by CWJ for inclusion in the Victims and Prisoners Bill currently going through Parliament.

The 'householder defence'

The law on self-defence has been amended in England and Wales to protect householders seeking to defend themselves against an intruder, allowing their actions to be found reasonable even if they appear disproportionate.

Subsection 76(5A) of the 2008 Act provides that where the case is one involving a householder, the degree of force used by the householder is not to be regarded as having been reasonable, in the circumstances as the householder believed them to be, if it was grossly disproportionate. A householder can therefore use force which is disproportionate but not grossly disproportionate, provided the degree of force was reasonable. This provision was introduced by a government amendment to the Crime and Courts Bill in 2013. Lord McNally said, on its introduction:[36]

> *These amendments are designed to shift the balance of the law further in favour of householders to ensure that they are treated first and foremost as the victims of crime… The Government feel strongly that householders, acting in extreme circumstances to protect themselves or others, cannot be expected to weigh up exactly how much force is necessary to repel an intruder.*

The Court of Appeal has since interpreted the impact of the amendment for householders as 'narrow'.[37] However, it does still allow a degree of latitude to the householder which then factors into the determination of reasonableness, and research would be useful on whether it has an impact on decisions to prosecute.[38] In any event, the denial of equivalent protection to women who are victims of domestic abuse, defending themselves against their abuser, is discriminatory and impossible to justify.[39]

Policy and procedural reforms

CWJ has recommended that statutory reform should be accompanied by a cross-government policy framework to aid implementation and procedural reform. This should include provision of support for survivors and the encouragement of use of special measures to protect vulnerable defendants. Statutory guidance, training for criminal justice agencies and judicial directions would also be required. The legislation and surrounding framework would have the significant added benefit of encouraging earlier disclosure of abuse[40] and access to support, and helping to break the cycle of victimisation and offending. This new

framework should include a review of the public interest test for prosecutors to take account of abuse and coercive control and measures to ensure this is implemented consistently. Specialist domestic abuse courts, where properly resourced, offer a model which could be learned from to achieve a more expert approach to cases involving defendants whose alleged offence may be linked to their own experience of domestic abuse.[41]

Others recommend amendment of the Crown Court Compendium to include judicial directions on self-defence which adopt a social entrapment approach in domestic abuse cases, supported by the admissibility of non-medical expert evidence on the nature and impact of coercive control.[42]

Reforms undertaken in comparable jurisdictions

Similar barriers to domestic abuse victims' successful reliance on self-defence exist in other jurisdictions. This briefing summarises reforms proposed and undertaken in three comparable jurisdictions – Canada, New Zealand and Australia - and assesses their impact.

Research published in 2014 compared trends in the outcomes of cases from 2000 to 2010 involving women committing homicide who had been subjected to domestic abuse in these three Commonwealth countries. The research found that, despite New Zealand having more liberal and flexible self-defence laws, it was Australia and Canada that appeared to have higher acquittal rates, fewer convictions for murder and a greater reliance on plea bargaining to produce manslaughter verdicts.[43]

In Canada reforms have included legislation pointing to the need for evidence on 'family violence' context, which appears to have had some positive impact on victim defendants' ability to rely on self-defence, although proposed reforms to police and prosecutorial practice have not been implemented. There are also questions as to whether current law and practice effectively reflect the wider social context for victims, including the inability of the state to protect them and their children, and additional considerations faced by migrant victims.

In New Zealand, reforms proposed by the NZ Law Commission have not been implemented, but increased understanding of the concept of 'social entrapment', judicial awareness raising and increased willingness to admit expert evidence on the dynamics of domestic abuse have led to some progressive decisions, including on sentencing.

In Australia there is a general trend to broaden the accessibility of self-defence to women affected by domestic violence, including through changes to the way the legal defence is framed, the admissibility of evidence and new jury directions, attempts to reduce reliance on the imminence of the threat faced by the victim defendant, with a growing focus on police and prosecutorial decision making.

There has been some focus in each jurisdiction on the particular barriers to justice faced by Black and minoritised women in, including through the 'social entrapment' framework.

Section One: Canada

Summary of paper by Professor Elizabeth Sheehy, Professor Emerita of Law, University of Ottawa, Canada

Canadian law on self-defence

In Canada self-defence is the primary defence available to women who use force against their abusers, including homicide. It is a full defence, available for any crime and, if successful, results in acquittal.

In 2013, responding to sex bias identified in self-defence law and the recommendations of a judge-led review, the Canadian government enacted new provisions that remain in force today. Section 34(1) of the Criminal Code of Canada provides that a person is not guilty of an offence if they believe on reasonable grounds that force is being used or threatened against them or another person, their actions are for the purpose of defending or protecting themselves or the other person, and "the act committed is reasonable in the circumstances".

In determining reasonableness, section 34(2) directs the court to "consider the relevant circumstances of the person, the other parties and the act", and sets out a non-exhaustive list of factors that the court must consider "in determining whether the act committed is reasonable in the circumstances". These include "the nature, duration and history of any relationship between the parties to the incident", and "the size, age, gender and physical capabilities of the parties to the incident".[44]

These new provisions were intended to widen the scope of the defence and remove the previous emphasis on the imminence of a threat and the proportionality of the accused's response.

If the accused provides evidence that she believed she (or another) was at risk of violence and that she acted with a defensive purpose, in a way that was reasonable in the circumstances, then the burden of proof shifts to the prosecution to disprove at least one of those necessary elements beyond reasonable doubt.

These reforms largely reflect the findings and proposals of the 1997 Self-Defence Review led by Her Honour Judge Ratushny. She reviewed the cases of 98 women convicted of homicide and, as well as urging law reform, recommended that seven of the convicted women be pardoned. She recommended retaining the combined objective/subjective test of whether the accused faced an unlawful assault, whether the force she used was needed to protect herself or another, and whether the force used was reasonable in light of the nature, duration and history of the relationship, including prior acts of violence or threats, past abuse and other factors now mostly incorporated into s.34(2).

Summary of other defences available for homicide

In addition to self-defence, other Canadian defences to murder include provocation and intoxication. These are both partial defences which reduce a charge of murder to manslaughter. There is also a statutory defence of mental disorder that must be proven by the accused. Duress can provide a defence but is only available if the accused has been forced to kill someone other than her threatener. Defences to manslaughter include extreme intoxication and automatism, both common law defences that the accused must prove on the balance of probabilities. If successful, these are complete defences. Extreme intoxication is much more commonly invoked by men charged with violence against women than vice versa.[45]

Understanding a woman's reactions: expert evidence to inform judge and jury

Supreme Court of Canada decisions in two cases helped to reshape the law on self-defence.

***R v Lavallee* (1990)**
In 1990 in the case of *R v Lavallee,* the Court ruled that expert evidence of 'battered woman syndrome' was admissible to provide a fair interpretation of the reasonableness requirements of self-defence and to educate jurors about the consequences of domestic abuse. The accused had shot her boyfriend in the back, as he was leaving the room saying he would "deal" with her later. She had endured years of serious abuse at his hands and he had previously threatened to kill her. At trial a psychiatrist gave evidence in support of the accused that her "shooting of the deceased was the final desperate act of a woman who sincerely believed that she would be killed that night".

The jury acquitted her but this was overturned by the Manitoba Court of Appeal, which declared the psychiatrist's evidence inadmissible. The case then went to the Supreme Court. Delivering the majority judgement Justice Bertha Wilson said: "If it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'."[46] The Supreme Court rejected the common law gloss that imminent violence or immediate physical attack is a requirement of self-defence, as this would condemn abused women to "murder by instalment".

The Supreme Court also jettisoned the common law "duty to retreat" for a woman in this situation, as it does not apply to a man confronting an intruder in his home. "A man's home may be his castle but it is also the woman's home, even if it seems more like a prison in the circumstances."[47] The Court affirmed that expert testimony about the impact of domestic abuse could "assist the jury in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life".

***R v Malott* (1998)**
This approach was reaffirmed by the Supreme Court in 1998 in *R v Malott*, another case involving a woman who shot her abuser using his gun, in what appeared to be an unprovoked, premeditated attack.

The Court said that to understand the reasonableness of the woman's actions "a judge and jury should be made to appreciate that a battered woman's experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women's experiences…"[48]

In their decision to admit expert evidence on domestic abuse, the Court identified additional factors for a jury to consider when determining the reasonableness of a woman's belief that killing her abuser was her only option, namely: "a woman's need to protect her children from abuse, a fear of losing custody of her children, pressures to keep the family together, weaknesses of social and financial support for battered women and no guarantee that the violence would cease simply because she left". [49]

Recommendations for further reforms to self-defence

Professor Elizabeth Sheehy had proposed the following further factors should be considered in assessing the reasonableness of an accused's belief that she needed to use the degree of force she did to protect herself:

- Were there realistic alternative means to protect herself?
- Had she attempted alternatives in the past?
- Was she afraid of retaliation?
- What was her economic and psychological state?
- Were her actions reasonable given her socialisation?

Sheehy further emphasised that the following factors not so far specified in the law can contribute to a woman's fear and lack of escape routes:

- Whether the deceased made threats regarding her immigration status or child custody;
- The role that systemic racism and gender bias play in narrowing her options;
- Her own experience of and barriers to police and legal systems;
- Her need for economic support and her caring responsibilities.

Sheehy opposed the Canadian Department of Justice proposal to add new objective riders of "necessity" and "proportionality" as these might reintroduce the "imminence" requirement. Neither did she support a wholly subjective test for self-defence proposed by *A Feminist Review of Criminal Law*[50] in 1985, not least because it would benefit perpetrators of abuse and police officers who kill. Also, it is the objective leg of the defence that allows expert evidence about nature and impact of domestic abuse to be presented. Sheehy recommended that self-defence must be available to women who are parties to homicide or who have contracted the killing.

The need for policy changes as well as law reform

Professor Sheehy and others argue that the mandatory life sentence for murder exerts pressure on abused women to plead guilty to manslaughter, rather than risk imprisonment for life if self-defence fails at trial. In response to this overwhelming pressure, HHJ Ratushny recommended four reforms to criminal justice policy:

1. **Police** must consult with a prosecutor to ensure any charges laid are appropriate.

2. **Prosecutorial Guidelines** should specify that all evidence including evidence of self-defence should be considered before pressing charges for homicide.

3. **Prosecutorial Guidelines** should instruct exercise of extreme caution in plea bargain discussions.

4. **Sentencing:** the Criminal Code should be amended to allow for leniency in exceptional circumstances.

However, to date no such changes have been made to police or prosecution policy or sentencing in Canada.

There have been several attempts through Private Member's Bills to make the life sentence for murder discretionary. Meanwhile research by Professor Sheehy (below) suggests that if

an abused woman can get to trial on self-defence, her odds of securing acquittal may be good.

Evidence of the impact of Canadian reforms to self-defence

The law, as initially reinterpreted by the Canadian Supreme Court in 1990s and since codified in s.34 of the Criminal Code of Canada, has allowed for many acquittals of abused women charged with murder, as shown by the following data analysis.

Analysis of case outcomes, 1990-2022
Professor Sheehy reviewed 91 Canadian trial transcripts from 1990 to 2005 involving women charged with murder, where self-defence was at issue. She found that in seven cases charges were dropped or stayed; 49 women pleaded guilty to manslaughter; one pleaded guilty to second- degree murder.

Of the 34 women who went to trial, three were convicted of murder, nine were convicted of manslaughter and 22 were acquitted (26%). Altogether 32 of the 91 women were either spared a trial or acquitted based on self-defence (32%) and 62 were convicted of homicide, mostly due to pleading guilty to manslaughter (56 women).

A more recent study of 36 women charged with homicide from 2000 to 2010 yielded similar results. Nineteen women pled guilty to manslaughter, one to murder; one charge was stayed. Of the 15 cases sent to trial, 11 women were acquitted, usually on the basis of self-defence.

The most recent case review conducted after the statutory reforms found 12 cases in the period 2013 – 2022 in which abused women had killed or stabbed a partner or ex-partner. In seven cases the woman was acquitted on the grounds of self-defence, in two she pleaded guilty and in two cases she was found guilty.

Conclusions
These data suggest that since s.34 was reformed, women who are driven to retaliate against their abuser are finding some success with self-defence claims. Nonetheless, despite the substantial and widely welcomed reforms to self-defence in Canada, there remains concern about whether the law provides sufficient scope to ensure the court understands the woman's options and sense of entrapment. For example, s.34 does not expressly prompt the need for evidence about the availability of women's shelters, police responses when women seek their help, the lack of social welfare and affordable housing, the safety of her children or the added vulnerabilities of women with insecure immigration status.

Section Two: New Zealand

Summary of paper by Professor Julia Tolmie, University of Auckland, New Zealand

New Zealand law on self-defence

In New Zealand, as in the other jurisdictions considered here, a successful claim of self-defence results in a complete acquittal. *Section 48 Crimes Act 1961* (New Zealand) provides that a person "is justified in using in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use."

There are three key questions for a jury to consider in a claim of self-defence:

1. What were the circumstances as the accused *honestly* believed them to be? A history of abuse and trauma and cultural background may shape the belief and expert evidence can be admitted to show this.

2. In those circumstances, was she acting in defence of herself or another?

3. Was the force she used reasonable in those circumstances?

Meaning of imminent threat and proportionate response

Section 48 itself does not expressly require the accused to be facing an actual or imminent attack. However, in assessing the reasonableness of the woman's defensive response the court has regard to:

- The perceived imminence and seriousness of the attack;
- Whether there were was an alternative course of action available of which she was aware; and
- Whether the defensive action was reasonably proportionate to the threat.

In a 1990 case [R v Wang] involving a woman who killed her violent partner while he slept, the Court of Appeal said "a threat which does not involve a present danger can normally be answered by retreating or some other method of avoiding the future danger". The New Zealand Law Commission has interpreted subsequent cases as clarifying that an accused person's beliefs about their circumstances include their beliefs about options available to them to escape the violence, including whether they could have sought or obtained effective protection from the police.

In 2001 and again in 2016 the New Zealand Law Commission recommended that s.48 be amended to clarify that use of force can be reasonable where "danger is not imminent but inevitable". This was intended to allow self-defence in domestic abuse cases where "the defendant has been subject to ongoing physical abuse within a coercive intimate relationship and knows that further assaults are inevitable, even if help is sought and the immediate danger is avoided". These reforms have not been implemented.

However, in assessing proportionality, courts in New Zealand have become more realistic in taking into account the fact that women generally use a weapon to defend themselves against a man's abuse due to the mismatch in size and strength and women's general lack of training in physical aggression.

Summary of other defences available for homicide

New Zealand has no partial defences reducing a charge of murder to manslaughter. However, a person charged with murder can be convicted of manslaughter instead if the Crown cannot prove the *mens rea* for murder, in other words an intention to kill or cause serious injury. This is not uncommon where women have used lethal force against abusive partners. If the prosecution cannot prove that she had the requisite intention to kill, she can still be convicted of manslaughter (assuming self-defence does not apply). A defence of provocation was repealed in 2009. There is no evidence that this has affected outcomes for women where they have used lethal force against their abusive partners.

Intoxication does not operate as a defence in New Zealand. Evidence of it is relevant to assessing the defendant's state of mind, but "drunken intent is nevertheless intent". The common law defence of automatism requires complete loss of volitional capacity and is rarely successful. The defence of insanity requires that the defendant be "labouring under a

natural imbecility or disease of the mind" at the time of offending and if successfully raised results in a verdict of insanity rather than an acquittal. So these are not realistic options for battered women.

Reforms recommended and undertaken

The mandatory life sentence for murder was replaced in 2002 with a presumption of life imprisonment and scope for mitigation, especially in family violence cases.

In its 2016 report *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (Report 139), the New Zealand Law Commission recommended modifying the Evidence Act 2006 to allow a broad range of family violence evidence to be submitted in support of self-defence. Expert testimony from psychologists on battered women syndrome has long been admissible and accepted in criminal proceedings in New Zealand, but the Commission recommended this be widened to admit evidence from a wider range of experts and practitioners on the "social context, nature and dynamics of domestic violence" including refuge workers and social scientists.[51] This has not been implemented.

The Commission also recommended continued education of judges, lawyers and police to improve understanding within the criminal justice system of the dynamics of domestic abuse. The legal profession *has* adopted this approach. Family Violence has been a theme of the District Court Judges Triennial Conference since 2015. Since then, the New Zealand Institute of Judicial Studies provides regular judicial training on family violence and there is a New Zealand Bench Book on Family Violence.

Understanding social entrapment

The New Zealand Family Violence Death Review Committee has proposed that for courts to understand the threat a woman faces and her options for dealing with it, they should fully consider:

- The efficacy and responsiveness of the "family violence safety systems" and
- The way intersectional inequalities shape the quality of safety responses to women and can compound their abusive partners' use of violence.

In other words, the prosecution should not simply be able to assert that calling the police or leaving the relationship were viable routes to safety for the woman charged, without supporting evidence.

The Committee argued for a "social entrapment approach" that understands a woman's circumstances as not only comprising her partner's abuse but also the failure of community and government agencies responsible for assisting her. The adequacy of agencies' responses to domestic abuse must enter the equation. All too often the state agencies responsible for providing protection are the same agencies that are unsafe for Indigenous women and women of colour to engage with. First responders such as police, child protection and health services have all been shown to be institutionally racist. Indigenous children may be removed as a response to the mother's experience of domestic abuse. Indigenous women in poverty are disproportionally represented among victims charged with using force against their violent partners.

A new approach to expert evidence and sentencing

Although New Zealand has yet to reform the self-defence provisions as recommended by the NZ Law Commission, the courts have recently shifted their approach to both the introduction of expert testimony on domestic violence by the accused at trial, and to

sentencing in cases where women have used force against abusive partners and have either not succeeded with a self-defence claim or have pleaded guilty.

***R v Ruddelle* (2020)**
Expert evidence about domestic abuse as a form of entrapment, comprising a cumulative pattern of harm rather than a series of single incidents, was accepted in *R v Ruddelle* (2020).

In this case the accused had stabbed her partner to death after years of domestic violence. Although she was not successful in arguing self-defence, she was found guilty of manslaughter rather than murder because it was not proved beyond reasonable doubt that she had intended to kill him.

The case is a significant legal development in terms of the kind of expert who could give evidence, the nature of the expertise provided and the approach to sentencing. Further evidence about the domestic violence and entrapment was admitted at sentencing, as the judge understood "the context of family violence is an integral feature of the offending here" and its relevance to culpability. He positioned the accused as an expert on her partner's violence and found she had "repeatedly sought help against violence in her life but that had led to short term response at best and removal of her children at worst".

The accused was of Maori heritage and further evidence of her entrapment was provided in a cultural report by an expert in Maori health. This enabled the judge to quality-check the pre-sentence report (PSR) initially presented, which had recommended imprisonment. The judge rejected the PSR, chastised the writer for a lack of professionalism and insisted on an improved report. The sentence then imposed was a period of home detention that enabled Ms Ruddelle to live at home and continue parenting her teenage son.

Evidence of impact

Research suggests that women tried for killing their abusive partners in New Zealand have generally been unsuccessful in arguing self-defence, and have lower acquittal rates and more murder convictions than Australia and Canada.

The New Zealand Family Violence Death Review Committee reported that from 2009-2015 there were 91 domestic / family violence death events. Most of these deaths were women killed by their partners, but in 16 cases women were charged with killing a violent male partner. Of these, 3 women were convicted of murder (19%), 8 of manslaughter (50%), 3 were acquitted (19%) and 1 was unfit for trial (with 1 case still outstanding).

In 2016 the NZ Law Commission surveyed media reports and reported cases over a 15 year period. Out of 24 cases of women being prosecuted for killing their abuser only 4 resulted in acquittal, 3 on basis of self-defence. 16 resulted in convictions for manslaughter, 4 for murder. Self-defence was raised in 10 of the 16 cases that went to trial but only 3 women succeeded. In all 3 cases the woman alleged that her use of force was in response to actual or current physical assault by her male partner and there was a third party witness.

Since *Ruddelle* there have been cases other than homicide where evidence of domestic abuse and an understanding of social entrapment have been introduced at sentencing, including one case of aggravated burglary and three cases of (defensive) assault/wounding.

Section Three: Australia

Summary of paper by Professor Arlie Loughnan, University of Sydney Law School and Dr Clare Davidson Sydney Law School and Research Associate, Australian Catholic University, with a contribution by Professor Stella Tarrant of the University of Western Australia

Overview of a federal jurisdiction

Self-defence in Australia is a dynamic area of criminal law and has seen a wide range of inquiries, reforms and impact assessment. Australia is a federal jurisdiction, consisting of the Commonwealth, six states and two territories, each of which has separate criminal laws, and self-defence laws vary across these nine jurisdictions.

There is, however, a general trend to broaden the accessibility of self-defence to women affected by domestic violence, including through changes to the way the legal defence is framed, the admissibility of evidence and new jury directions, as well as a growing focus on police and prosecutorial decision making. Growing public and political awareness of the way women can become trapped and disempowered by abusive partners has driven changes to the law and research on the impact of these changes.

Indigenous women are significantly over-represented in the number of women prosecuted for homicide of an abusive partner – making up 29% of cases (20 women) between 2010-2020 despite comprising 3.3% of the general population. Concern about this disproportionality informs reform proposals and advocacy.

Australian law on self-defence

Self-defence is a full defence and if successfully pleaded results in an acquittal. Where the defence is raised, the prosecution must prove beyond reasonable doubt that the accused did not act in self-defence. It applies to all criminal offences but is mainly raised in relation to assault and homicide. This formulation is the result of a major reconsideration of self-defence law in 1987 by the highest court in Australia, which sought to reduce the law's complexity, and has been incorporated into the criminal law of the States and Territories.

In three Australian jurisdictions there is an allied partial defence of excessive self defence which reduces murder to manslaughter and is not available for other offences. At common law this partial defence had a chequered history but in its current form, where it applies, it is aimed at women who kill their violent male partners because "excessive self-defence would seem to better fit the circumstances of women who kill in this [family violence] context than …provocation or …diminished responsibility… unlike diminished responsibility, women's actions are not treated as if they arise from a mental condition".[52]

There has been a movement in Australia to enable admission of social context evidence, including about the dynamics of domestic abuse rather than medicalised constructions of battered woman's syndrome. In several jurisdictions, parliaments have amended statutory provisions on self-defence to make evidence of the nature and effects of family violence more readily admissible. Reforms addressing this have been introduced in Victoria, Western Australia and South Australia.

The applicable self-defence provisions and reforms in each jurisdiction are summarised below followed by a general discussion of their impacts.

Self-defence in New South Wales (NSW)

The statutory definition of self-defence in NSW requires the accused to have believed it was necessary to use force in defence of themselves or another and this use of force must have been reasonable in the circumstances as the person believed them to be. The jury may consider the age, gender, health and physical circumstances of the accused in determining this second stage test. The law no longer requires that the accused person is responding to an imminent threat of violence – it is a matter of evidence relating to their perceived need for forceful self-defence (section 418 of the NSW Crimes Act 1900).

NSW has re-introduced the partial defence of excessive self-defence (in Section 421 NSW Crimes Act 1900). This reduces murder to manslaughter if the defendant genuinely believed their conduct was necessary and reasonable for a defensive purpose, but the conduct was not reasonably proportionate to the threat that the defendant genuinely believed to exist. In the leading case on this, the accused had been charged with manslaughter by excessive self-defence after she stabbed and killed her abusive ex-partner. The trial court found that her "conduct was not a reasonable response in the circumstances as she perceived them". But the Court of Appeal found that she perceived the attack as "urgent, life-threatening and inescapable" partly because of the "menacing rage exhibited by the deceased" in phone calls made before the physical confrontation. Her Honour Judge McCallum concluded that "the circumstances described in the evidence in this case are the kind in which, more commonly, it is the woman who is killed." (Silva v The Queen [2016] NSWCCA 284)

NSW recently introduced a new offence of coercive control as part of the State's endeavours to expand the criminal law's understanding of domestic abuse and the patterns of physical, psychological, sexual, emotional or financial abuse to which women may be subjected. Although not directly relevant to self-defence, there is an expectation that this will help inform its interpretation.

Self-defence in Victoria

As in NSW, the Crimes Act 1958 of Victoria requires that the accused "believes that the conduct is necessary in self-defence" and the conduct must be reasonable in the circumstances subjectively perceived by the accused (section 322K). The defence only applies to murder if the accused believed that her conduct was necessary to defend herself or another from death or "really serious injury" which is defined to include "serious sexual assault" (s.322H).

Victoria has gone further and legislated to clarify that self-defence can be claimed in non-confrontational cases and when the threat is not imminent, to make self-defence more accessible to domestic abuse survivors. Regarded as a model throughout Australia, Section 322M of the Crimes Act 1958 (Vic) provides that where self-defence is raised in the context of family violence, "the conduct may be a reasonable response in the circumstances as the person perceives them, even if (a) the person is responding to a harm that is not immediate; or (b) the response involves the use of force in excess of the force involved in the harm or threatened harm."

S.322M goes on to specify that evidence of family violence may be relevant in determining whether the accused believed their actions were necessary and reasonable in the circumstances.

In addition, the Crimes Act in Victoria now allows for a wide range of evidence of family violence to be adduced, including the history of the relationship; the cumulative effect on the accused; social, cultural and economic factors; and the general nature and dynamics of abusive relationships (section 322J(1) (a) – (f)).

Unique jury directions may be given in criminal proceedings where self-defence or duress in the context of family violence is in issue. For example, the jury may be told "that family violence is not limited to physical abuse and may include sexual abuse and psychological abuse; may involve intimidation, harassment and threats of abuse; may consist of a single act; may consist of separate acts that form part of a pattern of behaviour that can amount to abuse, even when some or all of those acts may, when viewed in isolation, appear to be minor or trivial; and that experience shows that people may react differently to family violence and there is no typical, proper or normal response to domestic and family violence; it is not uncommon for a person who has been subjected to domestic and family violence to stay with an abusive partner after the onset of violence or to leave and then return to the partner; and not to report family violence to police or seek assistance": *Jury Directions Act 2015* (Vic), s 60

Self-defence in South Australia

The defence is similar to that in NSW and Victoria but includes an added assessment of reasonability. The accused must believe that her conduct was "necessary and reasonable for a defensive purpose", and "the conduct must have been "reasonably proportionate to the threat that the defendant genuinely believed to exist" (s.15 Criminal Law Consolidation Act 1935).

As in NSW, there is a partial defence reducing murder to manslaughter if the conduct is not judged to be reasonably proportionate to the threat as the woman perceived it (that is excessive self-defence as in Silva above). A further clause clarifies that "in circumstances of family violence" the proportionality requirement "does not imply that the force used by the defendant cannot exceed the force used against him or her" (s.15B).

South Australia has also recently legislated (March 2021) to allow the court to consider evidence of family violence when assessing questions of reasonability, necessity, and proportionality if the accused asserts that the offence took place in the context of an abusive relationship.

'Circumstances of family violence' are defined in the Evidence Act (SA) s.34X to include 'social framework evidence' that can be given by experts and should include such "evidence as may be necessary or appropriate to ensure a jury has an adequate understanding of family violence".

Criminal Code jurisdictions

Criminal codes prevail in the remaining jurisdictions, with self-defence only available if responding to an attack, and primacy given to objective rather than subjective fault requirements. Two examples are given below.

Self-defence in Queensland
The Queensland Criminal Code provides a defence if force is objectively necessary for a person to defend themselves from unprovoked assault (s 271). Self-defence involving more extreme force, including causing death, can be argued if the accused subjectively believes on reasonable (objective) grounds that she could not otherwise save herself from death or grievous bodily harm. Case law has established that an assault need not present as an immediate threat to justify a response of self-defence, but commentators note that the requirement of an initial assault or threat of assault makes the defence less suitable for victims of family violence.

In 2010, the “preservation defence” was introduced for individuals responding to domestic violence (s.304B Criminal Code). A partial defence of “killing for self-preservation in an abusive domestic relationship”, it is intended for survivors of abuse and “slow burn provocation”. This was intended to avoid the difficulties of self-defence or provocation but has been little used. This verdict or plea provides sentencing discretion instead of the mandatory life sentence for murder but has been criticised as a poor substitute for self-defence, which is a complete defence that would apply in very similar circumstances.

Self-defence in Western Australia (WA)
Following amendments in 2008 to improve the operation of self-defence for women responding to domestic abuse, the law in WA provides that a harmful act is done in self-defence if the person believes it is necessary to defend themselves or another from a harmful act, whether or not it is imminent; and it is a reasonable response in the circumstances as the accused believes them to be and there are reasonable grounds for this belief *(Criminal Code Act s.248)*.

The Law Reform Commission of WA had highlighted that requiring imminence of attack “is hard to reconcile with the constant nature of domestic violence ... to require someone who has suffered abuse and controlling behaviour for some time to nominate a single point of confrontation as the reason for his or her retaliation, misunderstands the nature of violent relationships.”

WA is one of three States to have reintroduced a defence of excessive self-defence which operates to reduce murder to manslaughter if the accused genuinely believed her actions to be necessary and reasonable, but the conduct was not reasonably proportionate to the threat. As in Victoria, the Evidence Act now allows for special jury directions to be given on the context of family violence where self-defence is relied on. In WA they go further to include principles of a “social entrapment” model of domestic violence. They have adopted the formulation of coercive control from the Domestic Abuse (Scotland) 2018. A trial judge may give directions to a jury on factors affecting a person’s response to family violence – including the failure of agencies to provide help and safety. A lack of safety options may be exacerbated by “inequities associated with race, poverty, gender, disability, age”.

In 2020 amendments were made to the Evidence Act 1906 (WA) to clarify the relevance and admissibility of evidence of family violence, including in particular where self-defence is at issue.

Summary of other defences available for homicide

The Victorian Law Reform Commission recommended reintroduction of the partial defence of excessive self-defence as it seemed “to better fit the circumstances of women who kill in this [family violence] context than… provocation or… diminished responsibility… unlike diminished responsibility women’s actions are not treated as if they arise from a mental condition”.

In South Australia, excessive self-defence (Criminal Law Consolidation Act 1935 (SA)) provides that murder will be reduced to manslaughter if the defendant genuinely believed that the conduct was necessary and reasonable for a defensive purpose; but the conduct was not in the circumstances as the accused genuinely believed them to be, reasonably proportionate to the threat that the accused genuinely believed to exist.

Excessive self-defence is a double edged sword for women who kill their abusers – it may divert women from pleading self-defence, and a partial defence may result in a long prison term.

Reforms recommended and undertaken

There have been recent reforms across several jurisdictions to allow both expert evidence and specific jury directions on the nature of family violence, in an attempt to ensure juries are well-informed and have appropriate understanding. But concerns remain about the adequacy of these and other reforms. Doubt that these measures sufficiently allow a jury to determine whether a response was reasonable, along with the principles of the onus of proof, suggests no-case submissions may be a viable legal response in particular cases.[53] For instance, the prosecution dropped a murder charge on the basis of insufficient evidence that self-defence did *not* apply, where a woman had stabbed her partner following a prolonged assault during which he threatened to kill her.[54] In addition, at least one case was dismissed by a magistrate at committal stage.[55]

Defendants who draw on expert evidence remain in the minority, and most experts in these cases are forensic psychologists and psychiatrists rather than family violence experts.[56] Out of the 34 cases that went to trial between 2010 and 2020, only nine defendants adduced expert evidence. Five of these women were found guilty of manslaughter, while four were acquitted after successfully establishing self-defence; during this period, no women who went on to be convicted of murder had relied on expert evidence at trial.[57]

Attention from scholars and advocates has turned to prosecutorial practice in the context of family violence. There is room for improved decision making pre-trial, during the trial and in sentencing, with more account taken of family violence. The legitimacy of prosecuting individual women who have often been failed by the state is being questioned.

Evidence of impact

Empirical evidence shows that Australian jurisdictions seldom acquit women accused of murder unless they were being physically attacked at the time. The requirement that force used was reasonable might not take into account responses that appear irrational unless a backdrop of prolonged abuse is understood. Most survivors find it hard to show that their fear of death or belief that this was the only way to save themselves was reasonable.

Proportionality is also hard to prove outside cases of direct confrontation, including where a woman uses a weapon against an unarmed man. It is difficult to show immediacy, proportionality, necessity and/or the seriousness of the threat in non-confrontational cases, for example where the abusive partner is asleep or has his back turned, or where it is argued that the woman should have called the police to help or should have left the relationship. A survivor of domestic abuse may exhibit what is regarded as irrational over-reaction, but for her is a rational response due to her experience of trauma.

Between 2010 and 2020 across all Australian jurisdictions, 69 women were prosecuted for killing their abusive male partners.[58] They were charged with murder in almost 90% of the cases and the other ten percent were charged with manslaughter. The most common legal outcome (48% of cases) was defendants pleading guilty to manslaughter. In most of those cases (85%) women gave their guilty pleas in exchange for withdrawal of murder charges. Of those cases that proceeded to trial (49% of the total) women were found guilty of manslaughter in 44% of cases. 21% of the women were found guilty of murder and 11% were acquitted, almost all on the basis of self-defence. In total 13 of the 69 women were not convicted.

Evidence suggests that women are more likely to proceed to trial in jurisdictions that retain partial defences, such as NSW, WA and Queensland (which retains a mandatory life sentence for murder), while in jurisdictions with no partial defence, such as Victoria, they are more likely to plead guilty to manslaughter than risk a murder conviction.[59] Although the law

in Queensland has been criticised for maintaining the requirement of an initial assault, this jurisdiction had the highest proportion of acquittals for women charged with murder (36 per cent), followed by NSW (33 per cent). WA had the highest proportion of murder convictions (29 per cent) and the second highest proportion of Indigenous defendants (43% of WA cases involved Indigenous defendants).[60]

Professor Stella Tarrant notes early evidence of the impact of the recent reforms to the *Evidence Act* in WA. In *Kritskikh v Director of Public Prosecutions,*[61] an appeal against conviction for aggravated assault occasioning bodily harm was allowed by the Supreme Court on grounds that the magistrate had assessed the defendant's claim that she was defending herself inconsistently with the family violence provisions. And in *Western Australia v Bridgewater*[62] the amendments were referenced by the trial judge when questioning the prosecutor about whether, on the evidence, the defendant was defending her home when she stabbed her partner.[63] In response, the state withdrew its prosecution, and the manslaughter trial was discontinued.

The recent data outlined above show strong continuities with the preceding period. From 2000 to 2010, in Australia there were 67 reported cases involving 'battered women' defendants and only 11 of those cases resulted in acquittals on the basis of self-defence.[64] Significantly, out of the 11 acquittals, three involved using force when not being attacked by the abuser.[65] Evidence from this period suggests that women who killed their male partners were more likely to be convicted of manslaughter.[66] Notably, most charges were resolved by pleas of guilty to manslaughter.[67] It has been suggested that a number of these cases "demonstrate strong defensive components on the facts, suggesting that an acquittal on the basis of self-defence may have been justified in at least some of these cases. This raises questions about the prosecutorial practice of indicting the defendant for murder when a guilty plea to manslaughter is subsequently accepted".[68]

Conclusion and recommendations

The deficiencies in law and practice outlined in the introduction to this report, which lead victims of domestic abuse to be unfairly criminalised where they should have been able to rely on self-defence, are not unique to England and Wales. Sections One to Three of this report make clear that serious attempts have been made to reform law and practice in comparable jurisdictions, in order to address similar barriers to justice. This includes both statutory and procedural reform, and education of those working within the system, and there are signs of success in some areas. It is long overdue for a similar strategic effort to be made in England and Wales, in order to address the gaps in law and practice outlined in the introduction. This should include:

1) Legislation to reform self-defence and address problems of imminence and proportionality.

2) Exploration of how the 'social entrapment' model could help to inform proceedings.

3) Close work with women's specialist services to improve understanding and application in practice for police, lawyers and judges concerning domestic abuse and its relevance to victims' alleged offending, and cultural competency in cases involving Black, minoritised and migrant victim defendants. This should draw on learning from the Specialist Domestic Abuse Court model.

4) Revisions to the Code for Crown Prosecutors and introduction of a mechanism to challenge inappropriate prosecution decisions.

5) Measures to encourage admission of non-medical expert evidence to improve the understanding of judges and juries of the dynamics of domestic abuse and cultural context.

6) Explore the potential for a new partial defence, learning from the concept of excessive self-defence, in light of concerns that loss of control is not working well for women in these cases.

End notes

[1] Ministry of Justice (2018) Female Offender Strategy
[2] Gelsthorpe, L., Sharpe, G., and Roberts, J. (2007) Provision for Women offenders in the community; Centre for Women's Justice (2021) Women who kill: how the state criminalises women we might otherwise be burying
[3] Centre for Women's Justice (2022) Double Standard: ending the unjust criminalisation of victims of violence against women and girls
[4] Centre for Women's Justice (2022) No Safe Space: lessons for national policy and local practice from the West Midlands multi-agency response to women involved in offending or alleged offending who are victims of domestic abuse
[5] Centre for Women's Justice (2021) Women who kill: How the state criminalises women we might otherwise be burying
[6] Pitman, J (2022) *Invisible victims: What are the barriers to police recognising female offenders as victims of coercive control* [Masters thesis: Portsmouth University]
[7] Centre for Women's Justice (2022) Double Standard: ending the unjust criminalisation of victims of violence against women and girls, pp.26 et seq.
[8] Ministry of Justice (2018) Female Offender Strategy; Home Office (2007) The Corston Report: A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System
[9] Hester, M. (2012) Portrayal of Women as Intimate Partner Domestic Violence Perpetrators. Professor Hester studied the following three sample groups: (1) All women recorded by the police as sole domestic violence perpetrator in a heterosexual relationship (N=32); (2) a random sample of sole male perpetrators; and (3) a random sample involving 32 cases where both partners were recorded at some time as perpetrator. These different sets of cases were then compared to assess differences and similarities in the rate of arrest where allegations were made. Analysis showed that an arrest was three times more likely to follow where the allegations were made against a woman, than where they were made against a man.
[10] Wong, K. et al. (2017) T2A Final Process Evaluation Report, Policy Evaluation Research Unit
[11] The Disabilities Trust (2019) Making the link: Female offending and brain injury
[12] Howard League for Penal Reform (2020) Arresting the entry of women into the criminal justice system: Briefing Two. Five police forces responding to a Freedom of Information request by the Howard League for Penal Reform provided data on 317 arrests of women for alleged violent incidents. More than half of the arrests for alleged violence (163) resulted in no further action or release without charge.
[13] Light, M. et al (2013) Gender differences in substance misuse and mental health amongst prisoners
[14] Centre for Women's Justice (2022) Double Standard: ending the unjust criminalisation of victims of violence against women and girls
[15] Ibid. See also: Ministry of Justice (2023) Female Offender Strategy Delivery Plan 2022-2025 for recognition of the links between domestic abuse and women's offending.
[16] Section 342A of the **Police, Crime, Sentencing and Courts Act 2022** allows for someone convicted of an offence to be made subject to a Serious Violence Reduction Order in certain circumstances, including where they 'ought to have known' that a 'bladed article or offensive weapon was used by another person in the commission of the offence' or that 'another person who committed the offence had a bladed article or offensive weapon with them when the offence was committed'. This could lead to victims of coercive control being unfairly implicated in their abuser's actions, as appears to have occurred in cases of joint enterprise. (Clarke, B. and Chadwick, K. (2020) Stories of Injustice: The criminalisation of women convicted under joint enterprise laws. See also: Hulley, S. (2021) Defending 'co-offending' women: Recognising domestic abuse and coercive control in 'Joint Enterprise' cases involving women and their intimate partners, Howard Journal of Crime) Recent and forthcoming immigration legislation increases the vulnerability of victims of VAWG to exploitation and criminalisation. Sections 58 and 59 of the **Nationality and Borders Act 2022** penalise trafficking victims who disclose their exploitation too late (despite the fact that late disclosure is a known feature of trafficking and modern slavery). Section 63 allows victims with a reasonable grounds decision to be disqualified from protection if they are deemed to be a 'threat to public order' or to have made their application 'in bad faith'; this includes foreign national victims who have received a prison sentence of 12 months or more, even if their conviction relates to their exploitation. Proposals in the **Illegal Migration Bill**, if passed, would deny protection or support to victims of trafficking who arrive by irregular means, prevent them claiming asylum, and allow for their indefinite imprisonment. (Joint Council for the Welfare of Immigrants (2023) 'Illegal Migration' Bill 2023 Briefing)

[17] Justice Committee (2023) Pre-legislative scrutiny of the draft Victims Bill: Second Report of Session 2022-23 (para. 22). See also SBS' and Liberty's super-complaint on data sharing between the police and Home Office regarding victims and witnesses to crime
[18] Casey, L. (2023) Baroness Casey Review: Final Report – An independent review into the standards of behaviour and internal culture of the Metropolitan Police Service. On trust, see also: Crest Advisory (2022) Forgotten voices: Policing, stop and search and the perspectives of Black children which found that 'Black girls had the lowest level of trust in the police among all children; only a third of Black girls trusted the police compared to 43 per cent who actively distrusted the police.' (p.19), cited in Children's Commissioner (2023) Strip search of children in England and Wales – analysis by the Children's Commissioner for England. On police-perpetrated VAWG and response to VAWG, see also Centre for Women's Justice (2022) CWJ briefing on police perpetrated domestic abuse super-complaint outcome; and HMIFRCS (2021) Police response to violence against women and girls: Final Inspection Report
[19] HM Government (2023) Domestic Homicide Sentencing Review – Independent Review: Clare Wade KC
[20] Clare Wade KC comments on Government proposals regarding Domestic Homicide Sentencing Review, 17 March 2023
[21] See for example: Criminal Bar Association of England and Wales (2017) Defences available for women defendants who are victims/survivors of domestic abuse and Loveless, J. (2010) 'Domestic Violence, Coercion and Duress', Criminal Law Review, pages 93-108; Edwards, S. (2022) ' "Demasculinising" the defences of self-defence, the "householder" defence and duress', Crim. L.R. 2022, 2, 111-129; Edwards, S. (2019) The Journal of Criminal Law 2019, Vol. 83(6) 450–472, 'Recognising the Role of the Emotion of Fear in Offences and Defences' p.461; Wake, N. (2013) 'Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian perspectives' (2013) 77(5) JCL 433–57; Howes, S et al (2021) Women who kill: why self-defence rarely works for women who kill their abuser, Criminal Law Review Issue 11 2021; Bettinson, V. and Wake, N., 'A new self-defence framework for domestic abuse survivors who use violent resistance in response' *Modern Law Review* (forthcoming, 2024).
[22] See for example: Wistrich, H. (2022) Misogyny in the criminal justice system, The Political Quarterly Vol. 63 Issue 1, pp. 64-68, Jan 2022
[23] Howes, S. et al (2021) Women who kill: why self-defence rarely works for women who kill their abuser, The Criminal Law Review, Issue 11 2021 pp.945-97
[24] Centre for Women's Justice (2021) Women who kill: how the state criminalises women we might otherwise be burying
[25] In the remaining four cases, women were convicted of other crimes, considered unfit to stand trial, or the outcome is unknown.
[26] This may be an underestimate, as it was not possible to track accurately the various defences used by all the women who were included on our case list, due to the limited information available about some cases.
[27] Howes, S. et al (2021) Women who kill: why self-defence rarely works for women who kill their abuser, The Criminal Law Review, Issue 11 2021 pp.945-97
[28] Ibid
[29] Centre for Women's Justice (2021) Women who kill: how the state criminalises women we might otherwise be burying
[30] Edwards, S. (2019) The Journal of Criminal Law 2019, Vol. 83(6) 450–472, 'Recognising the Role of the Emotion of Fear in Offences and Defences' p.461.
[31] Law Commission (2004) Partial defences to murder: Final Report, pp.77-78
[32] Howes, S. et al (2021) Women who kill: why self-defence rarely works for women who kill their abuser, The Criminal Law Review, Issue 11 2021 pp.945-97, p.957
[33] For more detail on these provisions see: Centre for Women's Justice (2022) Double Standard: ending the unjust criminalisation of victims of violence against women and girls
[34] Hansard Vol 810 Col 1754, 10 March 2021
[35] Bettinson, V. and Wake, N., 'A new self-defence framework for domestic abuse survivors who use violent resistance in response' *Modern Law Review* (forthcoming, 2024). Bettinson and Wake argue that the proposals should be enacted, and further supported by novel complementary reform of the option to retreat, and the exclusion of intoxicated mistaken belief in self-defence claims, as well as proposing procedural reforms.

[36] Hansard, Report, House of Lords, 10 Dec 2012: Col 881
[37] *R v Steven Ray* [2017] EWCA Crim 1391. See commentary here: Self-defence and the Householder – Disproportionate Force May be Unreasonable Even in Defence of the Home - 2 Hare Court | London Barristers Chambers
[38] Howes, S et al (2021) Women who kill: why self-defence rarely works for women who kill their abuser, Criminal Law Review Issue 11 2021
[39] Wake, N. (2013) 'Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian perspectives' (2013) 77(5) JCL 433–57
[40] For evidence of women defendants' non-disclosure of abuse, and the negative implications of this for their case, see: Sakande, N. (2020) Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)
[41] Advance (2020) A Place To Go Like This: Breaking the cycle of harm for mothers involved in offending who are survivors of domestic abuse, and their children, p.39; Centre for Women's Justice (2022) Double Standard:

ending the unjust criminalisation of victims of violence against women and girls. See also: Standing Together and Centre for Justice Innovation (2023) Evaluation of the Westminster Specialist Domestic Abuse Court.

[42] Bettinson, V. and Wake, N., 'A new self-defence framework for domestic abuse survivors who use violent resistance in response' *Modern Law Review* (forthcoming, 2024)

[43] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, "Battered women charged with homicide in Australia, Canada and New Zealand: how do they fare?" (2014) 45(3) Australian and New Zealand Journal of Criminology 383
[44] Criminal Code of Canada S.34(2) (a) – (i)
[45] https://www.vawlearningnetwork.ca/our-work/briefs/extreme-intoxication-defence-brief.html#q1
[46] R v Lavallee [1990] 1 SCR 852 at 874
[47] Ibid at 888-9
[48] R v Malott [1998] 1 SCR
[49] Ibid para 42
[50] Christine Boyle et al, A Feminist Review of Criminal Law (Ottowa; Status of Women Canada 1985)
[51] While NZ has not enacted a standalone criminal offence of coercive control it has inserted the concept into the definition of "family violence" in the Family Violence Act 2018.
[52] Victorian Law Reform Commission, Defences to Homicide, 2004.
[53] Stella Tarrant 'Making no-case submissions in self-defence claims for primary victims of intimate partner violence charged with criminal offending' (2022) *Current Issues in Criminal Justice*, 3-4.
[54] Nash and Dioso-Villa (n. 75), advance.
[55] See cases reviewed in Danielle Tyson, *Justice or Judgment? The impact of Victorian homicide law reforms on responses to women who kill intimate partners*, Discussion Paper, Domestic Violence Resource Centre Victoria 2013
[56] See Bronwyn Naylor and Danielle Tyson "Reforming Defences to Homicide in Victoria: Another Attempt to Address the Gender Question" (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 72-87. doi: 10.5204/ijcjsd.v6i3.414.
[57] Ibid, 13.
[58] Nash and Dioso-Villa, forthcoming; ref on p.19 Loughnan & Davidson
[59] Ibid.
[60] Ibid.
[61] *Kritskikh v Director of Public Prosecutions* [2022] WASC 130
[62] *The State of Western Australia v Bridgewater* (Supreme Court of Western Australia, No 10 of 2019), transcript, 1062–1063.
[63] This is a defence under s 244 of the WA Code.
[64] Sheehy, Stubbs and Tolmie (n. 49), 667–668, 670.
[65] Elizabeth Sheehy, Julia Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide in Australia, Canada and New Zealand: How do They Fare?' (2012) 45 *Australian and New Zealand Journal of Criminology* 383.
[66] Rebecca Bradfield, *The Treatment of Women Who Kill Violent Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002), 23.
[67] Ibid, 22; Sheehy, Stubbs and Tolmie (n. 49); Debbie Kirkwood et al, *Out of Character: Legal Responses to Intimate Partner Homicide by Men in Victoria 2005–2014* (Domestic Violence Resource Centre Victoria, 2016) 32.
[68] Sheehy, Stubbs and Tolmie (n. 139).

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